

**REMARKS**

Claims 21, 23-32 and 34-37 are pending in this application. Claims 32-35 have been withdrawn from consideration. By this Amendment, claims 21, 23, 24, 32 and 24-39 are amended and claims 22 and 33 are canceled. Support for the amendments to the claims may be found, for example, in the claims as originally filed and in the specification at pages 4-6. No new matter is added.

In view of the foregoing amendments and following remarks, reconsideration and allowance are respectfully requested.

**I. Information Disclosure Statement**

An Information Disclosure Statement with Form PTO-1449 was filed on October 23, 2006. On the copy of the Form PTO-1449 returned with the Office Action, three French language references had been crossed out, indicating that they had not been considered of record. The Office Action states, at page 2, that the references were not considered because they were not provided in English.

Applicants respectfully submit that the non-consideration of the references was improper. Applicants submitted the references in accordance with their duty of disclosure under 37 C.F.R. §1.56 and §1.97. According to 37 C.F.R. §1.98, the Information Disclosure Statement must contain "a concise explanation of the relevance" of each non-English language document. However, that concise statement of relevance "can be either separate from the specification or incorporated therein." 37 C.F.R. §1.98(a)(3). Applicants are in no way required to obtain and provide English language translations of any non-English language documents. Furthermore, where the references are cited in a search report in a counterpart foreign application, "the requirement for a concise explanation can be satisfied by submitting an English-language version of the search report or action which indicates the degree of relevance found by the foreign office." MPEP §609A(3).

Applicants fully satisfied these duties, and therefore the references FR 2 838 055 A1 and FR 2 609 397 A1 must be considered. In particular, the Information Disclosure Statement clearly indicated that reference number 8 (FR 2 838 055 A1) was discussed in the International Search Report attached thereto, and that reference number 9 (FR 2 609 397 A1) was discussed in the foreign search report attached thereto.

Accordingly, the references must be considered, and that consideration made of record. The Examiner is respectfully requested to consider the disclosed information, and initial and return to Applicants a copy of the Form PTO-1449 indicating that the references have been considered of record.

Regarding reference 12 (FR 2 609 309 A1), which was also cited as reference 1 in the Information Disclosure Statement filed November 14, 2006, that reference was cited in error and need not be considered. See November 14, 2006, Information Disclosure Statement at paragraph number 4 on page 2.

## **II. Restriction/Election**

The Office Action, on page 3, acknowledges that claims 21 and 32 do not lack unity *a priori* and, thus, claims 21 and 32 can only lack unity *a posteriori*. However, for at least the reasons stated below, the common technical feature between claims 21 and 32 (the galenic bas of claim 21) is a "special" technical feature that is not disclosed and would not have been rendered obvious by the applied references. Accordingly, Applicants respectfully request reconsideration and withdrawal of the Restriction Requirement.

## **III. Claim Objections**

The Office Action objects to claims 21-31 and 36-39 because the terms "dermal" and "cosmetic" are allegedly not defined in the specification and, the Office Action alleges, one of ordinary skill in the art would not understand the difference between dermal and cosmetic. Applicants respectfully disagree.

If a term is not defined in the specification or a claim, it should be given its ordinary meaning in the art. Dermal is defined as, "of or relating to the skin or dermis." The American Heritage College Dictionary 382 (4th ed. 2007). Cosmetic is defined as, "a preparation designed to beautify the body by direct application." *Id.* at 322. Therefore, one of ordinary skill in the art would have been apprised that the claimed dermal and/or cosmetic galenic base can be either: for use on the skin, but not to beautify; used to beautify, but not on the skin; or used on the skin to beautify. Accordingly, Applicants respectfully assert that one of ordinary skill would be apprised of the metes and bounds of the claimed dermal and/or cosmetic galenic base. Thus, reconsideration and withdrawal of the objection are respectfully requested.

#### **IV. Rejections under 35 U.S.C. §112**

##### **A. Claims 21-31 and 36-39**

The Office Action rejects claims 21-31 and 36-39 under 35 U.S.C. §112, second paragraph, as allegedly being indefinite.<sup>1</sup> Applicants respectfully traverse the rejection.

As stated above, given the definition of "dermal" and "cosmetic," one of ordinary skill would have been apprised of the metes and bounds of the claimed dermal and/or cosmetic galenic base. Accordingly, Applicants respectfully assert that claims 21-31 and 36-39 meet the requirements of 35 U.S.C. §112, second paragraph. Thus, Applicants respectfully request reconsideration and withdrawal of the rejection.

---

<sup>1</sup> The Office Action fails to assert any details for this rejection and, thus, Applicants believe that these claims are rejected under 35 U.S.C. §112 under the same reasoning that they are objected to above.

**B. Claim 24**

The Office Action rejects claim 24 under 35 U.S.C. §112, second paragraph, for reciting a trademark/tradename ("Rhamnosoft"). Applicants respectfully traverse the rejection.

By this Amendment, the trademark/tradename is replaced with its generic form. Accordingly, reconsideration and withdrawal of the rejection are respectfully requested.

**V. Rejections Under 35 U.S.C. §103**

**A. Brock**

The Office Action rejects claims 21, 27, 29, 36, 37 and 39 under 35 U.S.C. §103(a) over U.S. Patent Application Publication No. 2003/0130636 to Brock et al. ("Brock"). Applicants respectfully traverse the rejection.

Without conceding to the propriety of the rejection, by this Amendment, the subject matter of non-rejected claim 22 is incorporated into claim 21 and claim 22 is canceled. Accordingly, Applicants respectfully assert that Brock would not have rendered obvious each and every feature of claim 21.

Claim 21 would not have been rendered obvious by Brock. Claims 27, 29, 36, 37 and 39 variously depend from claim 21 and, thus, also would not have been rendered obvious by Brock. Accordingly, reconsideration and withdrawal of the rejection are respectfully requested.

**B. Brock and Smith**

The Office Action rejects claims 21-24 under 35 U.S.C. §103(a) over Brock in view of U.S. Patent Application Publication No. 2004/0170670 to Smith et al. ("Smith"). By this Amendment, claim 22 is canceled, thus the rejection is moot as to that claim. As to the remaining claims, Applicants respectfully traverse the rejection.

By this Amendment, claim 21 recites, "A dermal and/or cosmetic galenic base whose aqueous phase comprises at least xylitol, mannitol, rhamnose and fructooligosaccharides." Applicants respectfully assert that Brock and Smith, individually or in combination, would not have rendered obvious each and every feature of claim 21.

The Office Action asserts that Brock discloses a galenic base whose aqueous phase contains mannitol, xylitol, glucose and fructose. Office Action, page 6. Although Brock discloses these compounds, they are only disclosed in the context of a generic list of over 45 specific examples of humectants that can be used alone or in mixtures of one or more. See Brock, paragraph [0030]. Brock fails to disclose that these components can or should be used in combination. However, the Office Action merely asserts that it is prima facie obvious to combine two compositions, each of which is taught to be useful for the same purpose. The Office Action, on page 8, acknowledges that Brock fails to disclose the use of rhamnose and fructooligosaccharide, as recited in claim 21.

To allegedly address the acknowledged discrepancy of Brock, the Office Action applies the disclosure of Smith. The Office Action asserts that Smith discloses the use of a composition comprising rhamnose and cyclodextrin. See Office Action, page 8. The Office Action further asserts that it would have been obvious for one of ordinary skill in the art to have combined the rhamnose and cyclodextrin disclosed in Smith with the mannitol, xylitol, fructose and glucose disclosed in Brock because Brock allegedly discloses a non-exhaustive list of humectants, and Smith allegedly discloses further topical soothing and moisturizing cosmetic products. Again, the Office Action asserts that the rationale for combining the disclosures of Brock and Smith is that "it is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose....[T]he idea of combining them

flows logically from their having been individually taught in the prior art." Citing *In re Kerkhoven*, 205 USPQ 1069, 1072 (CCPA 1980).

Applicants respectfully assert that neither Brock nor Smith, individually or in combination, disclose or would have rendered obvious the claimed galenic base. The references fail to disclose or have rendered obvious, and Office Action fails to assert, that fructooligosaccharides can or should be used in a galenic base composition, as recited in claim 21. Thus, for at least this reason, claim 21 would not have been rendered obvious by Brock and Smith, individually or in combination.

Further, Applicants respectfully assert that the *Kerkhoven* case, which is relied upon by the Office Action as providing a reasoning for prima facie obviousness, is not applicable in the present application. In *Kerkhoven* the claims in question merely combined two known cleaners. Further, *In re Crockett*, 279 F.2d 274, 126 USPQ 186 (CCPA 1960) and *Ex parte Quadranti*, 25 USPQ2d 1071 (Bd. Pat. App. & Inter. 1992) both held that claims were rendered obvious where two components known to perform the same function were combined. .

However, claim 21 combines four components selected from lengthy listings of possible components. For example, in paragraph [0030] of Brock, at least 45 possible humectants are listed. Among these are only two of the required components of claim 21 — mannitol and xylitol. Further, paragraph [0178] of Smith discloses rhamnose as one of four possible components. Applicants respectfully assert that choosing two specific humectants (Brock) from a list of 45 possible humectants and then modifying the combination to include a specific "skin-soothing active substance" from another reference (Smith) is not the same as combining two known cleaners as was done in *Kerkhoven*, two known iron treatments as was done in *Crockett* or two known herbicides as was done in *Quadranti* at least because claim 21 requires four components and because the humectants disclosed in Brock "increase water

content at the top of the skin" whereas the rhamnose disclose in Smith is a "skin-soothing active substance." See Brock, paragraph [0030] and Smith, paragraph [0178].

Further, the Office Action provides no reason or rationale for one of ordinary skill in the art to have known that the "humectants" of Brock may be combined with the "skin-soothing active substances" of Smith.

Also, to yield the claimed galenic base as recited in claim 21, even of Brock and Smith were combined, one of ordinary skill would still have been required to add fructooligosaccharides, which are not disclosed in any of the applied references. Accordingly, Applicants respectfully assert that Brock and Smith, individually or in combination would not have rendered obvious each and every feature of claim 21.

Additionally, Applicants respectfully assert that the galenic base comprising mannitol, xylitol, rhamnose and fructooligosaccharide provides decreased skin irritation over a compositions similar to those disclosed in the applied references. As is shown in the instant specification, beginning on page 15, two exemplary compositions were formed. The first (RO4FF17) does not comprise mannitol, xylitol, rhamnose and fructooligosaccharide, and the second (RO4FF18) does comprise mannitol, xylitol, rhamnose and fructooligosaccharide. The irritation of the two compositions were measured on the basis of the erythema parameter (including edema) and the desquamation parameter according to the following formula:

$$Z = \frac{\Sigma(\text{erythema+desquamation scores})_{\text{product}} - \Sigma(\text{erythema+desquamation scores})_{\text{control}}}{\text{number of subjects} \times \text{number of readings}}$$

See specification, page 16, lines 20-26. RO4FF17 resulted in an irritation index of 0.05 — weak — and RO4FF18 resulted in a irritation index of 0.00. See specification, page 16, lines 3-4. Therefore, as shown by the above example in the specification, a galenic base comprising mannitol, xylitol, rhamnose and fructooligosaccharide provides decreased

irritation over a composition that does not comprise mannitol, xylitol, rhamnose and fructooligosaccharide. The Office Action provides no reason or rationale for one of ordinary skill in the art to have expected this improved result by adding the four specifically claimed components to the compositions disclosed in the applied references. Accordingly, Applicants respectfully assert that even if a prima facie case of obviousness was presented by the Office Action, the above improved and unexpected results rebut such a prima facie case of obviousness.

For at least the above reasons, claim 21 would not have been rendered obvious by Brock and Smith, individually or in combination. Claims 23 and 24 depend from claim 21 and, thus, also would not have been rendered obvious by Brock and Smith, individually or in combination. Accordingly, reconsideration and withdrawal of the rejection are respectfully requested.

**C. Brock, Smith, Alaluf and Sanchez-Machado**

The Office Action rejects claims 21, 24, 25, 28, 30, 31 and 38 under 35 U.S.C. §103(a) over Brock and Smith, as applied to claims 21 and 24 above, and in view of U.S. Patent No. 6,423,325 to Alaluf et al. ("Alaluf"), and rejects claims 21, 25 and 26 under 35 U.S.C. §103(a) over Brock and Smith in view of Alaluf and further in view of Sanchez-Machado et al., *Food Chemistry*, vol. 85, pp. 439-444 (2003) ("Sanchez"). Applicants respectfully traverse the rejections.

For at least the reasons stated above, Brock and Smith, individually or in combination, would not have rendered obvious each and every feature of claim 21. Further, Alaluf is applied as allegedly disclosing fish oil and linseed oil, and Sanchez is applied as allegedly disclosing high amounts of omega-3 fatty acids. Therefore, neither Alaluf nor Sanchez is applied to address the above discrepancies of Brock and Smith as to claim 21. Accordingly,



Applicants respectfully assert that Brock, Smith, Alaluf and Sanchez, individually or in combination, would not have rendered obvious each and every feature of claim 21.

Claim 21 would not have been rendered obvious by Brock, Smith, Alaluf and Sanchez, individually or in combination. Claims 24, 25, 26, 28, 30, 31 and 38 variously depend from claim 21 and, thus, also would not have been rendered obvious by Brock, Smith, Alaluf and Sanchez, individually or in combination. Accordingly, reconsideration and withdrawal of the rejection are respectfully requested.

**VI. Conclusion**

In view of the foregoing, it is respectfully submitted that this application is in condition for allowance. Favorable reconsideration and prompt allowance of the application are earnestly solicited.

Should the Examiner believe that anything further would be desirable in order to place this application in even better condition for allowance, the Examiner is invited to contact the undersigned at the telephone number set forth below.

Respectfully submitted,



William P. Berridge  
Registration No. 30,024

Nicolas A. Brentlinger  
Registration No. 62,211

WPB:NAB/hs

Date: June 4, 2009

**OLIFF & BERRIDGE, PLC**  
**P.O. Box 320850**  
**Alexandria, Virginia 22320-4850**  
**Telephone: (703) 836-6400**

<p>DEPOSIT ACCOUNT USE AUTHORIZATION Please grant any extension necessary for entry; Charge any fee due to our Deposit Account No. 15-0461</p>
--